

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Miriam Lynch	Team: Squad #2	CCRB Case #: 201807564	<input checked="" type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Friday, 09/07/2018 5:00 PM	Location of Incident: [REDACTED]	Precinct: 101	18 Mo. SOL 3/7/2020	EO SOL 3/7/2020	
Date/Time CV Reported Fri, 09/14/2018 9:15 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Fri, 09/14/2018 9:15 AM		

Complainant/Victim	Type	Home Address
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

Subject Officer(s)	Shield	TaxID	Command
1. POM Joseph Foss	30244	950434	101 PCT
2. POM Marcus Fuller	12462	964520	101 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Joseph Foss	Force: Police Officer Joseph Foss used physical force against § 87(2)(b) [REDACTED]	[REDACTED]
B.POM Joseph Foss	Force: Police Officer Joseph Foss used a chokehold against § 87(2)(b) [REDACTED]	[REDACTED]
C.POM Joseph Foss	Force: Police Officer Joseph Foss restricted § 87(2)(b) [REDACTED] s breathing.	[REDACTED]
D.POM Marcus Fuller	Force: Police Officer Marcus Fuller used physical force against § 87(2)(b) [REDACTED]	[REDACTED]

Case Summary

On September 7, 2018, § 87(2)(b) filed this complaint via phone with IAB (Board Review 18), and it was received by the CCRB from IAB on September 17, 2019. On September 14, 2018, § 87(2)(b) called the CCRB and filed a complaint regarding the same incident.

On September 7, 2018, at approximately 6:20 p.m. § 87(2)(b) was driving near the intersection of § 87(2)(b) in Queens when his vehicle was stopped by Police Officer Joseph Foss of the 101st Precinct. Also present was Police Officer Marcus Fuller of the 101st Precinct. Police Officer Foss ordered § 87(2)(b) out of the vehicle, and § 87(2)(b) declined to leave the vehicle. Police Officer Foss grappled with § 87(2)(b) and struck § 87(2)(b) with his knee (**Allegation A: Force- Physical Force-** § 87(2)(g) Police Officer Foss allegedly used a chokehold against § 87(2)(b) allegedly restricting his breathing (**Allegation B: Force- Chokehold-** § 87(2)(g) **Allegation C- Force- Restriction of Breathing-** § 87(2)(g) Police Officer Foss and Police Officer Fuller then took § 87(2)(b) to the ground (**Allegation D- Force- Physical Force; within Allegation A: Force- Physical Force-** § 87(2)(g) § 87(2)(b) was arrested for resisting arrest, reckless driving, and obstructing governmental administration (Board Review 08) and criminal mischief (Board Review 19).

Video of this incident, taken by an unidentified civilian and obtained by the CCRB via a Facebook search, appears in IA #16 (Board Review 01) and is transcribed in IA #33 (Board Review 02). Relevant portions of this video has been excerpted and attached to IA #106 and IA #107 (Board Review 22 and Board Review 23).

Findings and Recommendations

Allegation (A) Force: Police Officer Joseph Foss used physical force against § 87(2)(b)
Allegation (B) Force:, Police Officer Joseph Foss used a chokehold against § 87(2)(b)
Allegation (C) Force: Police Officer Joseph Foss restricted § 87(2)(b)'s breathing.
Allegation (D) Force: Police Officer Marcus Fuller used physical force against § 87(2)(b)

§ 87(2)(b) was interviewed by the CCRB on September 19, 2018. Police Officer Fuller was interviewed by the CCRB on November 14, 2018. Police Officer Foss was interviewed by the CCRB on November 15, 2018. § 87(2)(b) gave a follow-up statement to the CCRB via VTC on December 7, 2018 (Board Review 03).

It is undisputed that Police Officer Foss decided to stop § 87(2)(b)'s car near the intersection of § 87(2)(b) and § 87(2)(b). Shortly into the vehicle stop, Police Officer Foss told § 87(2)(b) to leave the car. § 87(2)(b) did not leave the car. Police Officer Foss then opened the door of the car, pulled § 87(2)(b) from the car, and then he and § 87(2)(b) struggled physically on the side of the car. In the course of this struggle, Police Officer Foss struck § 87(2)(b) with his knee, and Police Officer Foss and Police Officer Fuller took § 87(2)(b) to the ground. Whether Police Officer Foss used a chokehold against § 87(2)(b) and restricted his breathing, however, is in dispute.

§ 87(2)(b) stated that he struggled physically with Police Officer Foss because he believed that Police Officer Foss had pulled out a knife during the stop. He said that this resistance consisted of him moving his torso back and forth, and extending his arms to his sides. He stated that Police Officer Foss struck him once in the left cheek with his knee, and that this strike did not cause any injuries.

During his initial statement on September 19, 2018, § 87(2)(b) said that Police Officer Foss used a “chokehold” against him for five seconds, during which he could not breathe. He could not describe what part of his neck that Police Officer Foss touched, nor could he say which part of Police Officer Foss’s body that the officer used to choke him. When the CCRB followed up with § 87(2)(b) on December 7, 2018, he stated that Police Officer Foss used his hands to choke him, wrapping them around his neck.

Police Officer Foss stated that at the outset of the incident Police Officer Foss pulled § 87(2)(b) out of his car by § 87(2)(b)’s shoulder. He had no difficulty in doing so. He placed him on the driver’s side of the vehicle, and told him to put his hands behind his back. § 87(2)(b) started physically resisting by tensing his arms and placing them towards the front of his body. Within a few seconds, he also began to grab at and grapple with Police Officer Foss, and placing his hands on Police Officer Foss’s head and his stomach. Police Officer Foss also felt pressure around his gun belt, near the handle of his firearm, where his gun was, but did not remember § 87(2)(b) specifically trying to remove his gun.

Police Officer Foss was also trying to grapple with § 87(2)(b) and trying to grab at his armpits, his upper arms, and his chest. § 87(2)(b) was shifting his body and trying to get away. § 87(2)(b) slipped away from Police Officer Foss, as he was substantially smaller than Police Officer Foss. Police Officer Foss attempted to strike § 87(2)(b) in the solar plexus, in his upper abdomen, with his knee, but missed and hit him between his stomach and chest instead. This action did not stop § 87(2)(b) was telling Police Officer Foss “get the fuck off me,” “What are you arresting me for,” and was yelling that Police Officer Foss had a knife and was trying to kill him. Police Officer Foss stated that he was not concerned with the traffic going by, as he was preoccupied with preventing § 87(2)(b) from coming into contact with his firearm. Police Officer Foss denied using any force other than grappling with and using a knee strike against § 87(2)(b).

When asked if he touched § 87(2)(b)’s neck, Police Officer Foss stated, “Not that I’m aware of.” He denied placing any pressure on the front of his neck, and denied placing § 87(2)(b) in a chokehold. Police Officer Foss did not think at any point that § 87(2)(b) could not breathe, as he was talking throughout the stop.

Police Officer Fuller could not describe the initial part of the struggle. When he arrived at the driver’s side of the vehicle, he saw § 87(2)(b) and Police Officer Foss holding each other in a position like a bear hug, holding each other by the shoulders. Both Police Officer Foss and § 87(2)(b) were leaning against the back driver’s side of § 87(2)(b)’s car.

Police Officer Fuller grabbed one of § 87(2)(b)’s legs, to try to push him to the ground. § 87(2)(b) tried to shift his weight and place his foot on the ground. Police Officer Fuller did not remember what, if anything else, he was doing to try to get § 87(2)(b) into handcuffs. When Police Officer Fuller began grabbing § 87(2)(b)’s legs, Police Officer Foss was still holding onto § 87(2)(b) with his hands. Police Officer Foss struck § 87(2)(b) in the chest area with one of his knees. § 87(2)(b) was at this point moving his torso back and forth, and still standing.

Police Officer Fuller remembered that during the struggle, Police Officer Foss’s arm made contact with § 87(2)(b)’s neck. At one point, § 87(2)(b)’s neck was in the crook of Police Officer Foss’ elbow, and Police Officer Foss’s arm was making contact with the side of § 87(2)(b)’s neck. Police Officer Fuller did not remember if Police Officer Foss made contact with the front of § 87(2)(b)’s neck, and he did not think that he made contact with § 87(2)(b)’s windpipe. Police Officer Fuller did not know how long they were in that position. Police Officer Fuller did not remember § 87(2)(b) ever indicating that he could not breathe.

Threat Resistance and Injury (TRI) Report § 87(2)(b), prepared by Police Officer Foss, noted that officers used a forcible takedown on § 87(2)(b) as well as knee strikes, and that § 87(2)(b) wrestled and pushed the officers (Board Review 04). TRI Report § 87(2)(b), prepared by Police Officer Fuller, noted that § 87(2)(b) wrestled the officers, and that a forcible takedown was used against him (Board Review 05). The Investigating Supervisor's Assessment Report completed by Captain Liju Thotam of the Crime Scene Unit noted only that § 87(2)(b) alleged that officers used "unnecessary force" against him during his arrest, but did not note what the force was (Board Review 16). He also denied having any visible injuries. LOD Report # § 87(2)(b) and AIDED Report # § 87(2)(b) indicated that Police Officer Foss strained his right shoulder and arm in restraining § 87(2)(b) and had pain in both knees (Board Review 06 and 17). § 87(2)(b)'s arrest report indicated that § 87(2)(b) flailed his arms to resist arrest, and that Police Officer Foss used a forcible takedown on him (Board Review 08).

Medical Treatment of Prisoner Report § 87(2)(b) prepared by Police Officer Fuller, stated that § 87(2)(b) was taken to the hospital of his own volition, for a sickle-cell anemia crisis, and did not mention any injury (Board Review 09). Medical records for § 87(2)(b) did not indicate any injuries (Privileged Documents).

During his interview, § 87(2)(b) mentioned that there was a video of the incident on § 87(2)(b). This video was located on § 87(2)(b) by the CCRB. § 87(2)(b) declined to say who posted the video, and he declined to say who was present when it was taken. This video begins with Police Officer Foss and Police Officer Fuller struggling with § 87(2)(b) on the side of a vehicle. § 87(2)(b) then moves away from Police Officer Foss, and pulls himself off of the side of the car. Police Officer Foss pulls him back and strikes § 87(2)(b) with his left knee on a part of his upper body that cannot be seen. During this struggle, Police Officer Foss holds onto § 87(2)(b)'s arms and shoulders. At one point in the video, Police Officer Foss places his arm around the back of § 87(2)(b)'s neck. The front of § 87(2)(b)'s neck, at this point, is obscured by both § 87(2)(b)'s car and by Police Officer Foss's arm. An unseen female individual says, "You're going to break his neck." The struggle lasts between one and two minutes with § 87(2)(b) continuously pulling his body strenuously away from the officers before Police Officer Foss pushes § 87(2)(b) to the ground. It does not definitively show Police Officer Foss using a chokehold against § 87(2)(b) (Board Reviews 22, 01, and 02).

§ 87(2)(b), § 87(2)(g)

Patrol Guide Procedure 221-01 states that officers may use reasonable force to place a person into custody or prevent escape from custody. It lists active evasion of custody and duration of resistance as some of the factors for consideration in whether the force used is reasonable (Board Review 10). Patrol Guide 221-02 characterizes "bracing" and "pushing" as "active resistance" (Board Review 11). Patrol Guide Procedure 221-03 lists strikes with hands and feet, and forcible takedowns as Level 1 force, the lowest level of reportable force.

§ 87(2)(b), § 87(2)(g)

Allegations Not Pleaded

Force- In her initial complaint to IAB, § 87(2)(b) alleged that officers assaulted her son at the stationhouse. § 87(2)(b) made no such allegations himself in his statements to the CCRB, and § 87(2)(b) did not cooperate with the CCRB investigation (Board Review 12). Therefore, this allegation is not being pleaded.

Abuse- The video obtained by the CCRB shows the shooter of the video standing approximately 10 feet away from a group of approximately four officers, and asking for a shield number multiple times. She does not specify which officer's shield number she is requesting. The voice of an unseen person provides Police Officer Foss's shield number. The investigation could not identify this person and follow up with them for clarification, therefore, this allegation is not being pleaded.

Civilian and Officer CCRB Histories

- Police Officer Foss has been a member of service for seven years. He has been a subject in nine prior complaints and 14 previous allegations.
 - A Force: Pepper Spray allegation was substantiated in case 201601572. The Board recommended formalized training, and the NYPD imposed formalized training.
 - § 87(2)(g)
- Police Officer Fuller has been a member of service for one year. This is the first complaint to which he has been a subject.
- This is the third CCRB complaint to which § 87(2)(b) has been a party (Board Review 13).
 - § 87(2)(b)
- This is the second CCRB complaint to which § 87(2)(b) has been a party.
 - § 87(2)(b)

Mediation, Civil and Criminal Histories

- This case was not suitable for mediation.
- According to the Office of Court Administration, between November 6, 2009, and March 26, 2019, § 87(2)(b) has been convicted of disorderly conduct (nine times), harassment (three times), criminal contempt (three times), assault (twice), resisting arrest (once), and unlawful imprisonment (once). § 87(2)(b)
§ 87(2)(b)
§ 87(2)(b)
- According to the Office of Court Administration, between October 21, 1992 and April 1, 2019, § 87(2)(b) has been convicted of disorderly conduct (three times) and attempted assault (once), § 87(2)(b) ges (Board Review 21).
- As of March 6, 2018, the New York City Office of the Comptroller did not have any record of a Notice of Claim being filed in regards to this case (Board Review 14).

Squad No.: _____

Investigator: _____
Signature Print Title & Name Date

Squad Leader: _____
Signature Print Title & Name Date

Reviewer: _____
Signature Print Title & Name Date